

THE ²
CASE
OF
TENURES

Upon the Commission of
DEFECTIVE TITLES.

Argued
By all the Judges of Ireland.

With their Resolution, and the Reasons
of their Resolution:

The Second Edition

DUBLIN

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King's Most Excellent Majesty; And are to be sold by
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Printing-House in *Skinner-Row*. 1682.

TO THE RIGHT
HONOURABLE,

THOMAS Viscount VVENTWORTH
Lord Deputy General of
Ireland.

MY LORD,



His work is Tours by more than one Interest, and therefore it returnes Naturally unto You, for to lay aside my particular Respects, (it being by Your Lordships favour that I serve His Majesty in this place,) You are Pater Patriæ, and not more by Your Office, than by Your love to this Nation, and Your most equal, and indifferent dispensation of Justice, (next under His Majesty) the Father of this Church, and Common-Wealth; And for whom can an Oblation of this nature be more proper? besides all that is here, as it was at first spoken in an humble Obedience to Your Lordships Order, so it was after upon a Noble invitation from You digested into this Forme, and it is now made publique by Your Commandment; so that in all the passages of

The Epistle Dedicatory

it, it carries Your Image, Your Superscription, and therefore by this Dedication, I do not so much give it, as restore it. If there be any thing in it, that is mine, that answers Your expectation, even in that, that it answers Your expectation, I have my reward; for all that are below Your Lordship, I hope it shall have this use, it shall satisfie them, that Your Lordships proceedings in this business have been in all points agreeable both to Honour, and Justice: God lead Your Lordship by the hand, until You have finished those great, and Heroical workes so happily begun, May they all prosper to the high pleasure of Almighty God, the increase of Honour, and Revenew to His Majesty: of Peace and Prosperity to this Kingdom, and to Your own immortall Glory.

Your Lordships most
humble Servant

JAMES BARRT.

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*The Case of Tenures upon the Commission
of Defective Titles.*

Trin. 13. Caroli Regis.



T the late Inquiry concerning His Majesties Title to the County of Mayo, there was an Act of State Published, wherein it was Declared, That it was not His Majesties intention, to take from His People any thing that was justly theirs; And that therefore none who held any Lands, or other Hereditaments whatsoever within that County, by Letters Patents from the Crown, should be any ways prejudiced by finding His Majesties Title, although their Letters Patents were not found; or well and certainly found, in the great Office then intended to be taken, but that they should have the same benefit of them, as if they had been specially found, so as they did produce their Letters Patents, or the Enrollment thereof, before the Lord Deputy and Council, at the Council Board, by a certain day limited in the Act, and that they were allowed by that Board to be good and effectual in Law.

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In pursuance of that Act, there were several Letters Patents produced, and among the rest, the Lord Viscount Dillon did shew forth Letters Patents, obtained from His late Majesty, and passed upon the late Commission of Defective Titles: Upon perusal and consideration whereof, His Majesties Council were of Opinion, that they were voyd in Law: And therefore it was thought fit, and so Ordered by the Lord Deputy and Council, that the Doubt arising upon the Letters Patents, should be drawn up into a Case, and that that Case should be openly argued at the Council Board, by Council learned on both sides.

The Case was after drawn up
in these words.

KING JAMES by Commission under the Great Seal, Dated the second day of March, in the 4th year of His Reign, did Authorize certain Commissioners, to grant the Mannor of Dale, by Letters Patents under the Great Seal of this Kingdom, to A. and his Heirs, and there is no direction given in the said Commission touching the Tenure to be reserved.

There are Letters Patents by colour of the said Commission passed unto A. and his Heirs, to hold by Knights service, as of His Majesties Castle of Dublin.

The Question is, whether the said Letters Patents be Voyd in the whole, or only as to the Tenure.

THIS Case was argued on several days, first by Nicholas Plunket for the Lord Dillon, and Serjeant Catlin

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Catlin for the King, and after by *John Polexsen* for the Lord *Dillon*, and *Osbaldeston* Attourney General for the King.

And because it was a Case of great Weight and Importance, it was delivered unto the Judges, and they were required by the Lord Deputy and Council, to confer and consider of it, and to return unto them their resolution concerning it, but they (upon private conference among themselves) did not agree in opinion, and therefore it was thought necessary for Publique satisfaction, that it should be argued solemnly by them all; and thereupon in *Trinity* Term last, the Case was argued by *Ryves* Puisne Judge of His Majesties Court of Chief Place, *Barry* second Baron of the Exchequer, and *Cressy* one of the Judges of the Court of Chief Place; And after on another day appointed for the Case, by *Mayart* one of the Judges of the Common Pleas, *Bolton* Chief Baron, *Lowther* Chief Justice of the Common Pleas, and *Shurly* Chief Justice of the Court of Chief Place.

And for that I intend to make as summary a Report as I can, I will first set down such Arguments, and Objections as were made by them that argued for the maintenance of the Letters Patents.

It was Objected by them, *That the Letters Patents were good for the Land, and Void onely as to the Tenure.*

For divers Reasons.

First, *Regularly* where a Man doth lesse than the Authority or Commandement committed unto him there (the

(the Commandement or Authority being not pursued) the Act is voyd; But where a Man doth that which he is Authorized to do, and more, there it is good for that which is warranted, and voyd for the rest. *Cokes Instit. sect. 434. Perk. 189. vid. 8 Coke 85.* But in the Case in Question, the Commissioners do that, which they had Authority to do and they do more; therefore for that which they had Authority to do, that is, to grant the Lands, the Letters Patents are good, for that which they do more, that is, the reserving of a Tenure they are voyd.

Their Authority was, to grant the Mannor of *Dale* to *A* and his heys, that they have fully done, and if they had stayed there, no Man will deny, but they had well Executed their Authority, but they go further, and do more, and Reserve a Tenure, therefore for that more, for that Reservation, their Act is only voyd.

Secondly, Where a Man hath Authority to do an act, and he doth it in substance, though he differ in the manner, yet the Authority is well executed. As if a Man make a Deed of Feoffment of *Black Acre*, and *White Acre*, and a letter of Attourney to enter into both Acres, and to deliver *seisin* of both of them, according to the forme and effect of the Deed; and he Entreth into *Black Acre*, and delivers *seisin secundum formam Cartæ*, this *livery* and *seisin* is good, albeit he did not inter into both, nor into one in the Name of both; and yet this is done in another manner, then his Authority Warrants; For his Authority was, to enter into both, and to deliver *seisin* of both, neither of which he doth, no not so much as enter into one in the Name
of

The Case of Tenures

of both:

So when the Feoffment is made to two, or more, and a Letter of Attourney to make *Livery* to both, and the Attorney makes *Livery* of *seisin* to one of the *Feoffees*. *secundum formam & effectum Cartæ*, this is good to both, and yet in that Case, he that is absent may wave the *Livery*; Surely, this is done by the Attourney in another manner, then the Authority warrants, for his Warrant was to make *Livery* to both, and the intention of the *Feoffor* was, that both should take, and the Estate be settled in both, and yet he makes *Livery* to one onely, and so, that the Estate may be settled onely in him, and yet he hath well executed his Authority, for in substance he hath done that which is commanded, and though it differs in the manner, it is not material, both those Cases are put in *Cokes Instit. sect. 66.*

But in the Case in Question, the Commissioners have done in substance, that which was commanded them, therefore their Authority is well Executed, and the Act they have done is good. That they have done in substance that which was Commanded them, appears in it self, for their Authority was to grant the Mannor of *Dale* to *A.* and his Heirs, that they have done: And if they have added any thing to the Grant, whereby it may be said to be done in another manner, yet the Act being done in substance, it shall be good.

Thirdly, That wherein they have exceeded their Authority, *scilicet*, the Reservation of the Tenure, it is not of the essence of the Grant; Of the essence of a Grant

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are onely Grantor, Grantee, and the thing to be Granted, and apt words in an Instrument or Patent : Besides , of the essence of a Grant it cannot be , for Grants were at Common Law, Tenures were introduced by the Conquest. *Seldon* in his *Not. to Eadmer.* 194. *Bracton. libr. 2. de acquir rerum Domin.* The Tenure is another distinct thing, *aliud* from the Land, in that they cannot consist in one Person, the Land is the thing Granted, that belongs to the Patentee, the Tenure is Reserved to the King , that belongs to him , the Reservation is *aliud*, or *supra* , or *præter* the Grant not *alio modo*. And therefore the Letters Patents may be voyd for the Tenure , and yet good for the Grant of the Land.

Fourthly, Although it were admitted, that the Reservation of the Tenure, be not a distinct thing, or *aliud* from that, which they had Authority to do , but is rather a doing of the same thing, for which they had Warrant, in another manner then their Authority does warrant, yet it will not follow, that the whole Act is voyd : For an Authority given, may be executed in another manner , *alio modo* then the Commission doth Warrant ; and yet stand good, for that which is done according to the Authority.

And that may be in these Cases.

First, Where the Authority is cloathed with an interest , for there in many Cases , he that hath the Authority may vary from the Authority : And the Act though it be done in another manner , shall be good. As
where

where the custome of a Mannor is, that the Lord may grant Lands by Copy of Court-Roll in Fee, if the Grant be in Tayle, or but for Life, this is good, *Stanton and Barnes his Case Hill. 36 Eliz. Rot. 492. in B. R. Cokes Instit. sect. 66.*

So where the custome was to grant Copies for two Lives, and he grants to the Husband for Life, and after to the Wife *Durante viduitate*. This is good. *Downes and Hopkins Case P. 36. Eliz. B. R.* The Statute of 32 Hen. 8. doth enable Tenant in Tayle, to make a Lease for one and twenty yeares, if he makes a Lease for twenty years onely, or to one for Ten years, and after makes a Lease to another for eleven years more, this is good, and so it hath been Resolved in *Tompson, and Traffords Case, Hill. 35. Eliz. B. R.*

Secondly, Where the varying from the Authority given, is in Letter, or Circumstance, and not in a point material, or in substance, for that see the Cases cited before *Cokes instit. Sect. 66. & Litt. 434.*

Thirdly, Where the varyance from the Authority although it be in matter of substance, is supp'ed by operation of Law. As if a licence be granted to a Copyholder for Life, to make a Lease for Ten years, if he shall so long live, the Copy-holder makes a Lease for Ten years absolutely, without the limitation, *videlicet*, if he shall so long live, yet adjudged good; and the Licence well pursued. It was *Hut. and Arrowsmiths Case Hillar. 38 Elizabeth. B. R.*

And in the Case in *Question*, where all agree, that
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the Kings meaning in this Commission was, that a Tenure in *Capite* should be Reserved, albeit it be not expressed in words; Or if it had been in expresse terms, that a Tenure in *Capite* should be reserved, and they had onely granted the Mannor, without reservation of any Tenure, yet the Law supplying this defect, and raising a Tenure in *Capite*, this shall make the Grant good.

Fourthly, Where the variance from the Authority is cured by the party himself, by some other act; As if Tenant in Tayle, Husband and Wife, a Bishop &c. who are Authorized by the Statute of 32 *Henr.* 8. to make Leases for one and twenty years, or three lives of Lands usually lett, make a lease of Lands usually lett, and of Lands not usually lett, reserving one entire Rent, all is voyde: *Shepheards Case*; But if Tenant in Tayle will make such a lease, and reserve the accustomed Rent for the Lands usually lett, and another Rent for the Lands not usually lett, here the lease shall be good for the Lands usually lett, and voydable onely for the other, for by these several reservations, the variance from the Authority is Cured. *Tanfeild and Rogers Case Trin. 36 Eliz. B. R.*

Fifthly, Where the variance from the Authority (how material soever it be) is notwithstanding made voyde, either by the Common Law, or Act of Parliament; as where the King does licence *I. S.* to grant twenty Markes Annuity in *Mortmaine*, and he grants the Annuity with clause of Distress, by *Huffey*, and *Bryan* Chief Justice, and *Starky* Chief Baron, and Justice *Faierfax*, the addition of Distress is without war-

warrant, and voyd; yet all admit the grant of the Rent good notwithstanding. 2 & 3 H. 7. grants 36.

By the Statute of first *Eliz.* a Grant by a Bishop of an ancient Office of Seneschallship to two, that had never before been granted, but to one, is adjudged voyd, 10 *Coke* 61. the Bishop of *Salsburies* Case: Put case then that such a Grant is made by a Bishop to *I. S.* and to an Infant, jointly, or the one after the other, this is a material variance, and yet, because the Grant in respect of the Infant is voyd, (as it was held in *Scambler* and *Walters* Case, *M.* 40. & 41 *Eliz. B. R.* cited in *Cokes Instit. sect. 1.* the Grant to *I. S.* (as they held) is good.

Fifthly, Although the *habendum*, *tenendum*, *condition*, &c. be parts of a Grant, yet the *habendum* may be voyd, and the Grant good, as in *Auditor Kings* Case cited in 8 *Coke* 56. in the Earl of *Rutlands* Case; where the Case was, the King granted Lands to *A.* and his heirs, in the Premises, *habendum* to him, and his Assigns, omitting the word heirs in the *habendum*, yet the Fee shall pass by the Premises, and the *habendum* shall be voyd.

The Condition may be voyd, as in *Littletons* Case a Feoffment upon condition that he shall not alien, and yet the Grant remain good.

Sixthly, The reservation of a Tenure was not necessary in the Grant, if it were not necessary, it is *inutile*, and *utile per inutile, non vitiatur.* 3 *Coke* 10. *Downties* Case.

Seventhly, The Honor of the King shall be preferred before his profit 9 *Coke* 131. in *Bewleys* Case; and therefore when the Kings Grant may be taken to two intents good,

good, in many Cases, it shall be taken to that intent, which is most beneficial for the King: But if it may be taken, to one intent good, and to another intent voyde, there for the honour of the King, and the benefit of the Subject, it shall be taken in such manner, that the Grant of the King may take effect, for it was not the intent of the King, to make a voyde Grant, *vid.* 8 Coke 56. the Earl of Rutlands Case, the Lord Staffords Case, 8 Coke 77. the Earl of Cumberlands Case, 8 Coke 167.

Upon this Rule the Case of Priddle and Napper. 11. Coke 11 was put, which was said, to be a far stronger Case, then the Case in Question, and that, in Case of an Authority executed in other manner, *alio modo*, and yet good: The point resolved, as to this purpose, was this, King Hen. 8. did grant Licence to the Prior and Convent of Mountacute, to appropriate the Church of Tintinhul to their Priory, and this was, *per verba de præsenti tempore*.

It did appear, that at the time of the Licence, the Church was full of an Incumbent, and so that no appropriation could be made, *in præsenti* but *in futuro*, by special words, to take effect, after the death of the present Incumbent; and therefore the Licence ought to have been special, otherwise the King was deceived in his grant and so the appropriation voyd, which by colour of that Licence, they made to take effect, after the death of the Incumbent: but it was resolved, that the appropriation was sufficient in Law, for the Licence was general, and therefore it shall be taken in such sence, that it may take effect that is to
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take effect, after the death of the Incumbent. And the reason there given, is the rule before remembred, for Construction of the Kings grants.

In which Case it is to be observed, first, that the Licence or Authority given by the *King* was in general words, to make the appropriation presently. Secondly, that this Authority could not be Executed in that manner. Thirdly, by vertue of that Licence, they make the appropriation *in futuro*, S. to take effect after the death of the Incumbent so they do it in another manner, then their Authority Warrants, and yet good, and their Authority well pursued.

Then if that Authority Executed in so different a manner, from the words of the Authority, was adjudged to be well Executed, much more shall it in this Case be said to be well Executed, when they have pursued the very words of the Authority, and if to some intent there might be a Construction made, to make the grant voyd, yet if by another Construction, the grant may be made good, and the *Kings* intention fulfilled, without any prejudice to him; then for the honour of the *King*, and the benefit of the Subject, that Construction shall be made, that the grant shall be good, and such Construction may be made in this Case, for here the Tenure reserved being voyd (as it is agreed by a'l) a Tenure in *Capite*, (being the Tenure intended by the Commission) shall be raised by Implication of Law; by this Construction the grant shall be made good, and the *Kings* intention shall be fulfilled, without any prejudice to him.

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They agree, that in all grants of Lands by Letters Patents here in *Ireland*, by vertue of the *Kings* Commission or Letter Missive under the privy Signet, if that Tenure be not reserved, either by the Letters Patents, or by the Law, which is directed by the said Commission, or Letter missive, there the grant shall be voyd in the whole, both for the Land and Tenure.

And therefore, where the *King* gives power, to grant Lands, and to reserve a Tenure, which the Law will not Create, or to reserve some other thing, which the Law it self will not reserve; as if the Commission had been to grant Lands, and to reserve a Tenure by Knights service if the Land be granted, reserving a Tenure in *socage*, the grant is voyd in the whole.

So if the Commission had been, to grant Land, and to reserve Twenty shillings Rent, and they reserve Ten shillings; In these Cases the Commissioners have not done so much, as they should, the *King* is prejudiced, and no Construction or Implication of Law can help, as in our Case it doth.

And here in this Case, the Tenure reserved shall not Toll that Tenure, which is Implied by the Law, because the Tenure reserved is voyd: For that they cited the Case of *Littleton*, in his Chapter of *Frank-almoigne*, *sect.* 140.

A Man that holds Lands by Knights service, at this day grants them, by Licence to an Abbot, &c. to hold in *Frank-almoigne*, the Tenure reserved is voyd, and he shall hold by Knights service, and so a gift in *Frankmarriage* reserving a Rent, this reservation is voyd, and he shall hold only by fealty.

4 H. 6. 22. Otherwise it would be, if the reservation were good, for there the tacite reservation shall be silent, as in *Wheelers Case* 6. *Coke* 6.

They agree, that if these Letters Patents had been made, by Bill signed by the *Kings* own hand, under the great Seal of *England*, the Tenure reserved would Controll the Tenure, which the Law would have raised; For in Letters Patents past in *England*, the Letters Patents are *ultima intentio Regis*, and the Judges (who are to make Construction thereof) are to ground their Judgment, upon the Letters patents themselves, and the contents thereof, without any regard to the particular, or any thing without the Letters Patents, *Doddingtons Case*, 2. *Coke* 34.

But in Letters Patents of Lands in *Ireland*, under the Great Seal of *Ireland*, the Letters Patents are not *ultima intentio Regis*, but *tota, & sola, prima, & ultima intentio Regis* are all to be taken, and gathered out of the Commission, or Warrant from the *King* under the privy Signet, upon which they are passed and here the Judges are to ground their Judgment upon the Commission, or Warrant, as well as upon the Letters Patents.

And to these seven Arguments, or reasons, all that was spoken by them; that argued for the Letters Patents may be reduced.

But it was resolved by the two Chief Justices, the Chief Baron, Baron Barry, and Justice Ryves (with whom Baron Lowther agreed in Opinion, though he
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could not then argue, by reason of sickness.)

*That the Letters Patents are voyd in Law,
both to the Land, and to the Tenure.*

*In this Case five things did fall into
consideration.*

1. The *Commission* mentioned in the Case, and the Authority of it.
2. *Authorities*, and their several sorts, and how they ought to be pursued.
3. The *Authority in this Case*, what it is, if it be pursued, as it ought to be; wherein it is not pursued.
4. *Tenures* what they are in the Grant, that the reservation of a Tenure is *modus concessionis*, that it is not *aliud*, or a distinct thing from the Grant, that *Tenures* had their *originall* in *England*. before the *Norman Conquest*.
5. The *reasons* why the Letters Patents are voyd in the whole, and the *Authorities* upon which the *Resolution* is grounded.

1. The *Commission* mentioned in the Case is the *Commission* that was in force, in the time of his late Majesty, for the strengthening of Defective Titles, a *Commission* that was one of the greatest graces, and bounties, that ever (before that time) was vouchsafed by the *Kings of England* to their Subjects, of this *Kingdom*; a *Commission*, that was agreed by a'l, to be a good, and

and legal, and effectual *Commission*, and to contain in it self full power, and Authority to grant.

Of which the *Chief Justice* of the *Common Pleas* in his argument said, that upon this occasion he did seriously peruse it, and in his Judgment, it was as full, and strong a Commission, for granting the Lands, (*Concurrentibus hiis quæ de jure requiruntur*) as any he had seen. There was in the Commission (as he said) *plenitudo potestatis*, there is not any question of the Commission, nor of the power granted by the Commission; Neither (as it was declared) was it the intention of his Majesty, to deny unto the Subject, the full benefit of it in all things, wherein the Commissioners had pursued their Authority, given by the Commission; and proceeded according to the Law.

For that, that there was no direction in the Commission for the Tenure, it was no defect in the Commission, (as the *Chief Baron* observed) nor any omission, or negligence in them, that were trusted with the drawing of it, it was done upon good advise, and of purpose; for the Cases of them, that were to pass upon that Commission, were so different, and there was such variety of Tenures, that it was not possible, to give any certain direction in the Commission concerning them.

Besides the Intention of that *Commission* was not, to give Authority, for the alteration, or diminution of the *Kings* Tenures; it was intended only, for the establishing of the Estates, and Possessions of the Subject. And therefore there is not a word in it of any Tenure, so that the purpose of it was, where any former Tenure

was *in esse*, to preserve it, and where no Tenure was *in esse*, to leave it to the Reservation of the Law.

So that now the *Commission* being cleared, and agreed to be good, and legal, and to contain full power, and ample Authority to grant the Lands.

The sole *Question* will be, of the pursuance of the *Commission*, and whether this power granted by the *Commission*, be well Executed, and pursued by the Commissioners.

2. To find out the Law in this Case, the several sorts of *Authorities* in our Books were considered, and how they ought to be pursued.

For *Authorities* these differences were agreed for Law.

All *Authorities* are either Authorities in Law or Authorities in fact 8 Coke 146. the 6. *Carpenters Case*.

Authorities in Law are, where the Law gives Authority, without any Authority from the party, as the Law gives Authority to the Lord, to distrain for his Rent, and service, to the owner of the soyle, to distrain damage Feasant, to him in the reversion, to enter, and see if wait be done, and the like.

An *Authority in fact*, is where the Authority is given by the party.

<p><i>Authorities in fact</i> are either</p>	}	<p>Nude and bare Authorities, or Authorities clothed with an Interest Cokes <i>insist.</i> 52. Nude</p>
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Nude Authorities are given either by

1. Deed.
2. Commission.
3. Patent.
4. Writ
5. or Act of Parliament.

And for all those Authorities, it is a certain rule, and ground in our Law, that they are to be pursued strictly, and precisely, both for matter, and form, or otherwise, the Act done, by colour of that Authority is voyd 10 H. 7. 15.

But the Execution of Authorities that are cloathed with an interest, are of a more large, and favourable Interpretation, then the Execution of those, that are but bare Authorities 5 Coke 94. & 95. in Barwickes Case.

1. That Authorities by Deed are to be pursued strictly, and precisely, both for matter, and manner. See the Case of 12 Afs. 24. 26. Afs. 39.

There the Case was, that the Plaintife did make a Charter of Fee-simple to the Tenant, and a Letter of Attourney to deliver Livery of seisin, the Attourney delivers Livery upon condition, this Livery is voyd; for the Authority is not pursued in the manner.

So on the contrary, if the Letter of Attourney had been, to deliver Livery of seisin upon condition, and the Attourney makes Livery without condition, this is voyd Cokes instit. 258. 11. H. 4. 3. A Letter of Attourney is made, to make Livery alter the death of I. S. and

and the Attourney makes *Livery* during the life of *I. S.* all is voyd 40. *Afs.* 38.

If I command a Man, to make a Deed of Feoffment in my name, according to a Copy shewen unto him, in *Latine*, if he make a Deed of Feoffment according to the effect of the same words, in *English*, or *French*, the Feoffment is without Warrant, for in that Case, *he does not pursue the Authority in the manner*, 10 *Henr.* 7. 9. So where an Authority is given to entfeoff, and he leavyes a Fine, *ibid.* § 10. *Henr.* 7. 15.

2. *For Authorities by Commission*, that they must be pursued, it is the Earl of *Leicesters Case* in *Plowd.* Com. 380.

The Earl of *Leicester*, 1. *Mar.* was Indicted of High Treason, before Sir *Richard Sowthwell*, and seven other Commissioners, by vertue of a Commission, directed to the said Sir *Richard* and Fourteen more.

After another Commission was directed to Sir *Thomas White*, and others reciting that where the Earl of *Leicester* stood Indicted, before Sir *Richard Sowthwell*, and Fourteen other Commissioners, of divers Treasons, &c.

It gave them Authority, *ad indictamentum prædictum recipiendum, & ipsum Robertum super inde audiendum, &c. ac debito sine triandum, terminandum, &c.*

By colour of that Commission, they did Arraign him upon that Indictment found before eight of the Commissioners, he Confessed the Treasons, &c. and had his Judgment.

It

It was resolved, that all that was done was voyd and *coram non iudice*, for that they did not pursue their Authority.

Thirdly, *Authority* by Patent must be pursued.

The King licences an Abbot and Covent to *Alien*, the Abbot sole *Aliens*, it is voyd, 21 *Henry* 7. 7. & 8 An the Rule given by *Frovvicke*, when the King makes any Grant or Licence, it ought to be executed accordingly, and strictly, as if the King grantes me Licence to make a Feoffment by Deed, I cannot make a Feoffment without Deed; Nor *é Contra*, So that the Licence must ever be pursued, or otherwise the Act done, is not warranted by the Licence, *vid.* 18 *Aff. Pl. ultimo*. The Lord *Clifords* Case 2 *Coke* 80. *Stamf. prærog. Regis* 31.

The Licence was to levy a Fine of the Mannor of *Dale*, to find two Chapleins, he would have levyed the Fine, leaving out the Chapleins, and could not be suffered 3 *Ed.* 3. 5 *Stamf. ubi supra*, *vid.* 30 *Ed.* 3. 17.

Fourthly, *Authorities* by *Writ* must be pursued.

In a *præcipe quod reddat* there must be two Summoners, therefore Summons by one Summoner is not good. *Plowd. Com.* 393. 50 *Ed.* 3. 16.

Fifth'y, *Authority* given by Parliament must be pursued.

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The Statute of Merton Cap: 3 ordaines, that in a *Redisseisin*, the Sheriff *assumptis secum custodibus placitorum Coronæ*, &c. *accedat ad tenementum illud de quo facta fuerit querela*. If the Sheriff take but one Coroner, it is not good, for the Act appoints a number, two at the least, which number ought to be satisfied, or else the Authority given by the Act is not pursued, 23 Aff: 7 Plowd. Com. 393.

So that by the Rule of all these Books it is manifest, that a *Nude Authority must be pursued strictly; both for matter and manner, or the Act done by colour of the Authority is voyde.*

But in what Cases, the Act so voyd for not pursuing of the Authority, shall be voyd in the whole, or in part onely, this difference was taken.

Where he that hath an Authority doth that which he is Authorized to do, & *aliud*, and another thing distinct from that for which he hath Authority. And where he doth the same thing which he is Authorized to do *alio modo*, in another manner, than the Authority does warrant.

In the first Case it is good, for that which is warranted, and voyd for the *aliud*: In the other it is voyd for the whole.

And therefore if a letter of Attourney be made to *I. S.* to make *Livery of seisin* in *White-Acre*, and he makes *Livery* in *White-Acre*, and *Black Acre*, there he doth *Idem* & *aliud*: And therefore it is good for *White-Acre*, that is according to his Authority, and pur-

pursuant to it, and voyd for *Black-acre*, which is aliud from his Authority, *Perk* 38.

Otherwise it would be, if the Letter of Attourney were to make *Livery* of one Acre, and he makes *Livery* of two Acres, there it is voyd for both; because he couples both together; and it is not named in certain in the Feoffment, of which Acre *Livery* shall be made; according to 4 *H*: 7. 5. But in the Case of *Perk*, the Acre is named in certain, *White-Acre*, and so a difference,

On the other side, when the same thing is done in another manner than the Authority Warrants, there is *Idem alio modo*, and therefore all is voyd; as in the Case of 12 *Afs*: 24. 26. *Afs*. 39. 40 *Afs*: 38. 10 *H*: 7. 9. the Cases already cited.

The true reason why in all those Cases the Act is voyd, because the Authority is Executed *Alio modo*, and so is the reason expressly given in the Book of 12 *Aff*. why the *Livery* is voyd, *because the Attourney doth it in other manner, than the Authority Warrants.*

This is the difference that must Rule the Case one way or other.

And therefore the on'ly labour will be to find out under which part of that difference the Case in Question doth lye.

3. *For that.* First it will be necessary to enquire. 3.

*What the Authority in this Case is,
whether it be pursued as it ought to be?*

D

where-

*The Case of Tenures.
wherein it is not pursued.*

The Authority given to the Commissioners in this Case is twofold:

An Authority Expressed in their Commission.
S. to grant the mannor of Dale.
And an Authority Implied in Law, to reserve
a Tenure in Capite.

For where there is no direction for the Tenure, the Law will imply a Tenure in Capite, as the best for the King.

In this Case then by the very Commission, the Tenure is made a part of the Grant, and *modus concessionis*, for the Authority though it be twofold, *Expressed* and *Implied*, yet both being put together, that which is to be done by vertue of that Authority, is but one entire Act, one grant, a grant of the *Mannor of Dale*, reserving a *Capite Tenure*, so that their Authority to grant the Land is not absolute, but *sub modo*, so that they reserve a Tenure in *Capite*; and although the power to reserve a Tenure in *Capite*; be only Implied by the Law, and be not given by Express words in their Commission, that makes no difference:

For by the rule of our Books, Authorities Implied in Law, as well as those that are Expressed, must be pursued.

Where a Letter of Attourney is made to deliver *Livery of seisin*, the Attourney hath a twofold Authority.

An Authority Expressed in his Warrant, and that

that is General to deliver seisin:

And an Authority Implied in Law, that is to deliver an Actual and Express *Livery*, and not a Livery in Law.

And therefore if the Attourney delivers *seisin* within the View, though it be Warranted by his Express Authority, yet because he hath not pursued his Implied Authority, the Act is voyd. And so it was resolved, *P: 3. Eliz. C. B. in Tarhams Case, Cokes Instit. sect. 66.*

This then being their Authority. *S. to grant the Mannor of Dale, and upon the grant to reserve a Tenure in Capite.*

Now how have they Executed this Authority?

There are Letters Patents passed to A: and his Heirs, by Colour of the Commission, to be holden by Knights service as of his Majesties Castle of Dublin.

Here they have not pursued their Authority, for where by the Commission either a Tenure *in Capite* ought to have been reserved, or else the Tenure left to the reservation of the Law, they expressly reserve a Tenure by Common Knights service.

That the *Letters Patents* as to this Tenure (thus reserved) are voyd, it was agreed on all sides.

But whether they should be only voyd to the Tenure, or whether the reserving of a Tenure, so drives from the Tenure intended, and Warranted by the Commission, shall destroy the whole Grant, both for the Land and Tenure, was the point, wherein they did differ.

4. 4. And for the clearing of that they did enquire, what the reservation of a Tenure is to the Grant.
 Whither it be a Part of the Grant; And *Modus Concessionis*.
 Or whither it be a distinct thing, and *aliud* from the Grant as this Case is.

For if (as they that argued for the *Letters Patents* held) the *Reservation* of the *Tenure*, and the *Grant* of the *Land*, be *Aliud & Aliud*, two distinct things in the Consideration of the whole Grant made, and the Authority given by the said Commission, for the making thereof, then peradventure the Patent may be voyd, as to the *Tenure*, and yet good for the Grant of the *Land*.

But if the *Reservation* of the *Tenure* be incident unto the Authority, and Included within it; and the *Reservation* of the *Tenure*, and the *Grant* of the *Land* make up but one entire grant, so that the one is a part of the other, and the *Reservation* of the *Tenure* be *Modus Concessionis*, then the granting of the *Land*, reserving a diverse or contrary *Tenure*, to that which their Authority did Warrant them to reserve, is a doing of *Idem alio modo*. And so the whole Act is voyd.

They held that the Reservation of the Tenure is Modus Concessionis, and that it is not Aliud. S: a thing distinct and separate from the Authority of the Grant of the Land, but Impliedly Included within it, and incident to it.

Although a grant may be without *Habendum*, Express *Tenendum*, *Reddendum*, or *Condition*, yet when they

they, or any of them are added, they are *de mo to Con-*
cessionis, and do direct, and rule the Grant.

1. For the *Habendum*.

The proper Office of the *Habendum* is to limit
the Estate;

- | | | |
|-------------------------|---|---------------------------------|
| yet sometimes
it may | { | 1. Alter the Estate in the pre- |
| | | mises. |
| | | 2. Diminish or Enlarge. |
| | | 3. Give to a stranger. |
| | | 4. Make the grant voyd. |

1. It may alter the Estate in the Premises.

As where Land is given to two in the Premises, *Ha-*
bendum, the one moyety to the one, and the other moye-
ty to the other, by the Premises they have a joynt Estate,
the *Habendum* makes them *Tenants in Common*, *Litt: 66*. So
where Land is given to two, *Habendum* to the one for
Life, the remainder to the other. By the Premises they
should have a joynt Estate in Possession. But the *Haben-*
dum doth alter that, and maketh the one sole Tenant of
the Freehold for Life, and the other sole Tenant of the
Remainder. 8 E: 3. 320. Feoffments and Faits 73.

2. It Enlarges or Diminishes the Estate that
would pass by Implication in the Premises,
and so destroys the Implication, this is Com-
mon in every grant.

3. It gives to a stranger not named in the Premises of the Grant.

As if a man gives Lands to *I. S. Habendum* with *A.* his daughter in *Frank-marriage*, there the Wife not named in the Premises, by the *Habendum*, takes a joynt Estate with her Husband. *this Case is vouched in Pl. Com. 158. to be in 4. E. 3 which being not found in that year, it is there so left without any further reference, but you shall find it in 5 E. 3 17. so Cokes instit. sect. 17. yet vid. 4 E. 3. 4.* So likewise where a Lease is made to *A. Habendum* for Twenty years, the Remainder to *B.* and his Heirs, here *B.* gaineth an immediate Freehold, by the *Habendum*, and yet he is not named in the Premises of the Deed. *Plowd. Com. 158.*

4. It will make the Grant voyd.

As if I have a Rent in Fee, and I grant it to another, if I stay there, the grant shall be for life, but if I say further, *Habendum* after the death of *I. S.* there all shall be voyd, *Plowd. Com. 152 156.*

So if the King grants Lands by Letters Patents, *Habendum* from a day to come, there the whole grant is made voyd by the *Habendum* 5 Coke 93. *Barwicks Case.*

He in the Reversion for life grants his Estate, *Habendum* after *Michaelmas*, and after *Michaelmas* the Tenant Atturues, yet Resolved that the grant is voyd, though if there had been no *Habendum*, it had been good by the Premises of the Deed, *Bucklers Case, 2. Coke 55.*

In

In all these Cases, the *Habendum* being voyd, makes voyd the Grants, which would have been good without it.

2. As the *Habendum* hath these several operations in the Grant, so hath the *Reddendum*.

As an Estate by *Implication* shall be Controlled by an Express limitation; so an Implied *Reservation* shall be Controlled by an Express Reservation,

A man makes a Lease rendring Rent, and does not say to whom the Rent shall be paid, this by *Implication* shall be to the Lessor, and his Heirs, but if the words be to the Lessor, the Heir shall not have it. 31 H: 8. Dyer 45. 12. E: 3. Afs. 86. Plowd. Com: 171. in *Hill and Granges Case*. 10 E: 4 18. & 21 H: 7. 25.

The Reservation of a Rent in some Cases shall make Severance of the Grant, and make several Grants and several Reversions.

As if a man makes a Lease of three Mannors, reserving Twenty shillings for one, five pound for another, and Twenty Pound for the third, there are several Reversions and there shall be several Avowries, 14 Eliz: Dyer, 308: *Winters Case* 9 E: 3. 12. 5. Coke 55. *Knights Case*.

3. For the *Tenendum*:

The proper Office of the *Tenendum* is to reserve the Tenure, and to Toll the Tenure by *Implication*.

Before the Statute of *Quia Emptores Terrarum*, If a man

man made a Feoffment, the Feoffee held of the Feoffor by such services, as the Feoffor held over; But if other services were Reserved, then the Feoffee held by such services as were Reserved.

That the Donee in Tayle shall hold of the Donor, as the Donor held over, is *Regularly* true, if the Donor make no special Reservation, for then the special Reservation Excludes the Tenure, which the Law would Create. *Cokes Instit. Sect. 19. vid. 34. H: 8. Dyer 52.*

4 For the Condition.

That does likewise direct, and Rule the Grant, the Condition does change the Quality of the Grant, and makes the Estate Conditional, and Defeasible, which otherwise would be Absolute, and Indefeasible.

So that all these, viz. the Habendum, the Reddendum, the Tenendum, and the Condition, are de modo Concessionis, and do Rule, and direct the Grant, the first limits, and sets forth the Quantity, the other Describe the Quality of the Estate.

And of all these the *Tenendum* is inseparably annexed to the Estate, the rest may be determined, and yet the Estate continue, but the Tenure cannot be Determined, as long as the Estate continues.

1. The Condition may be Released.
2. The Rent may be Released.
3. The Estate may be Enlarged.

But the Tenure cannot be destroyed, It may be trans-

transferred from one to another; in Case of common persons; But a Tenure in *Capite* cannot be transferred. or extinct by any Release, or Grant, for it is an incident inseparably annexed to the Crown.

It was *Obj.* that the Tenure is *Aliud* from the land, for the land is the subject, and the Tenure belongs to the King.

To that, first, it was *Answ.* that the *Quest.* is not, whether the Tenure be *Aliud* from the land, for tis clear the land is one thing, and the Tenure another, but the *Quest.* is, whither the reservation of the Tenure be *Aliud* from the authority of granting the land, or included in it, as *modus concessionis* S. they shall Grant and Grant in this manner. *R. sp.*

2. It was answered, both are the Kings; But the Tenure was asleep by the possession in the King, and it is now to be awakened by this *Commission*, in which is appears, that the intent, and plain meaning of the King was, to grant the land to the subject, and to reserve the Tenure for himself. And that the Tenure is not such a stranger to the land, it is proved by our books, in *Mary Blages Case*. 1 H. 4. 2. It is said, that lands lies naturally in Tenure. 2. that land lies always in Tenure; And therefore the Tenure is of the nature of the land, it arises out of the land, and hath existence in the land, it is inherent in it, and inseparable from it, it is upon the matter of the essence of the grant of the land, for no grant of land in *Fee simple*, to a common person, either from the King, or a common person can be without a Tenure, either expressed, or implied, We have not in our Law properly *Allodium*, that is, any land in the hands of a subject, that is not holden, *Cokes Inst. sect. 1.*

The lands onely that are in the Kings possession are free from Tenure, for a Tenant is he that holdeth

of some superior Lord, by some service; And therefore the King cannot be a Tenant, because he hath no superior, but God. *prædium domini Regis est directum dominium cuius nullus est Author nisi Deus.*

And as Bracton saith. *lib. 1 cap. 8.*

omnis quidem sub eo, & ipse sub nullo, nisi tantum sub Deo.

vid. lestatute. 16 R. 2. cap. 5. 14 Eliz. Dyer 313. 1 Coke 47. vid. 8 Coke 118. where it is said, that it would be against Common Right and Reason, that the King should hold of any, or do service to any of his Subjects; and therefore some have thought it not so proper, in the Kings Case, to say, that he is seised in *dominio suo ut de feodo.* Cowell Interpret. *verb. feudum & institut. p. 66.* As if *feodum* or *feudum* were taken in our law as it is in the feudall law onely for lands held by services.

But with us it hath another signification, Littleton tels us, *feudum idem est quod hæreditas*, and so it was defined, long before Littleton, by Bracton, and Briton, and Fleta.

And in truth it hath two significations in our Bookes, In the first, it is taken to be the same with an inheritance, and so it is proper enough in the Kings Case.

In the other it is taken for lands held, as in that of *Hors de son fee.*

We find both in Bracton *lib. 4. cap. 9. fol. 263. feudum est quod quis tenet ex quacunque causa sibi & hæredibus suis, &c. & alio modo dicitur feudum, quod quis tenet ab alio sicut dicitur talis tenet de tali tot feuda per servici-um militare.*

And

And agreeing with him is *Fleta* (which for the most part is transcribed out of *Bracton*) *lib. 5. cap. 5.*

And here just occasion might be taken , to clear our Mr. *Littleton* , from that imputation which is cast upon him, by the Author of the *Common-Wealth* of *England*, *pag. 127.* Where he layes ignorance to his charge , for saying, that *Feodum idem est quod hereditas*, Which (says he) it doth not signifie in any language.

It were easie to make it manifest, how proper that sence is, but because it hath partly appeared, by that which hath been said, and for that the Author of that Book is not known, for some have doubted, whether Sir *Thomas Smith* be the Author of it, or no, Sir *John Fernes generosity*, *pag. 99.* And so to argue with him, would be to fight with a shadow, therefore they did abstain.

So that is clear, that only Lands in the Kings possession are free from Tenure, but if they once come into the hands of a Common person, there if the Feoffor do not reserve a Tenure, the Law will.

Before the Statute of *Quia Emptores Terrarum*, if a man made a Feoffment in Fee, and reserved no Tenure, the Law did Imply a Tenure, and the Feoffee held of the Feoffor, by such services as the Feoffor held over.

Upon a Feoffment made after that Statute, if no Tenure were Expressed, the Law will Imply a Tenure *de Capitalibus Dominis*.

And as it is in the Case of Common persons, so in the Kings Case, In every Grant wherein Feesimple passes, there must be a Tenure either Expressed, or Implied.

Of such Necessity is the Reservation of a Tenure in the Kings Grant, that although the King should Grant Land without any Reservation of Tenure, or by Express words *absque aliquo inde Reddendo*, yet the Law would Create a Tenure in *Capite* 33 *H: 6. 7. 6. Coke 7. Wheelers Case* 9 *Coke* 123. *Anthony Lowes Case*.

14 *H: 6. 12. The Abbot of St: Bartholomews Case*. The King Grants Lands in Fee, *Tenendancy Frankement come le Roy est en son Corone*, yet the Patentee shall hold in *Capite*, for it is vested in the King by his Prerogative, and cannot be Extinct,

It is so Inseparable it cannot be Released. In *Anthony Lowes Case*, the King Grants, or Releases the Services to his Tenant, and his Heirs, this release cannot Extinguish the Tenure in all, though where the Tenure is by Common Knights Service, or socage, it Extinguishes all the Services, but that only, which is an accident Inseparable to every Tenure, *viz: fealty*, and all for this reason, *Because there is a necessity of a Tenure*, and the Kings Charter doth not alter the Law; the Tenure and Services are part and Parcel of the Mannor, and shall go with the Mannor, and descend as the Mannor, to the Heir of the part of the Mother, although it be newly Created, 5 *E: 2. Avowry* 207.

Besides consider the Tenure in the Commencement, and fruits of it, it is ever Inherent in, and Relative to the Land.

The Commencement of the Tenure. So the Form of doing *Homage* and *Fealty* is, that he shall be faithful and true for the Land that he holds.

The

The Fruits of the Tenure, what are they? but the profits of the Land, Wardship, Livery, primer seisin, relief, fine for Alienation, and the rest.

And therefore where the Land and signiory meet in an equal Estate, and right, in the same person, the Signiory by unite of possession is Extinguished, and there are two reasons given of that Extinguishment;

1. Because the Signiory that was first Extracted out of the Land, when it comes to the Land again, it is naturally Extinct, for it is *Revolutio ad materiam primam*.

2. He that hath all the profits entirely, cannot be said to have part of the profits Sir I: Davys Rep: 5.

The Escheat which is the last resort of the Tenure, is the Land it self, and therefore the Reservation of the Tenure cannot be said, to be a distinct thing from the Grant of the Land as *Black-acre* from *White-acre*.

It was Objected, that *Tenures in Capite* were brought *Obj.* in by the Conquest, but Grants were by the Common Law, then if Grants have been ancienter then Tenures, the Tenure of Necessity must be *Aliud* from the thing Granted.

To prove that this Tenure was brought in by the Norman Conquest Selden was cited in his *Spicileg: to Eadmer: p: 194.* here he hath that out of *Bracton de Acquir: rerum Domini: lib: 2.*

For in eorum servitium dicitur Regale servitium quia spectat ad Dominum Regem, & non ad alium, & secundum quod in conquestu fuit ad inventam.

It

Resp.

It was answered that M: *Selden* in that place does barely Recite the words of *Bracton*, not delivering any Opinion, of his own:

For in that Book cited, pag: 170. and in his *Titles of Honour*, the last Edition, pag: 612. We find that he was of another Opinion, and that this Tenure was in use in *England*, in the times of the *Saxons*.

What were those *Thani Majores*, or *Thani Regis* among the *Saxons*? but the Kings immediate Tenants of Lands, which they held by personal Service, as of the Kings person by Grand Serjeanty, or Knights service in *Capite*.

The Land so held, was in those times called *Thainland* as Land holden in socage was called *Reveland*, so frequently in *Domes-day*: *hæc terra fuit terra Regis Edwardi Thainland, sed postea converſa est in Reveland: Cokes Instit. secti: 117.*

After some years that followed the coming of the *Normans*, the Title of *Thane* grew out of use, and that of *Baron* and *Barony* succeeded for *Thane* and *Thain-land*.

Whereby we may understand the true, and Original reason, of that which we have in the *Lord Cromwells Case*, 2 *Coke* 81. That every *Barony* of antient time was held by *Grand Serjeanty*; By that Tenure were the *Thain-lands* held in the time of the *Saxons* and those *Thain-lands* were the same that were after called *Baronies*.

'Tis true the Possessions of *Bishops* and *Abbots* were first made Subject to *Knights Service* in *Capite* by *William the Conqueror*, in the fourth year of his
Reign

Reign, for their Lands were held in the times of the Saxons: *in pura & perpetua Eleemosyna*, free, *ab omni servitio seculari*.

But he then turned their Possessions into Baronies, and so made them *Barons* of the Kingdom by Tenure, so that as to them, this Tenure, and service may be said to be *in Conquestu adinventum*. But the *Thain-lands* were held by that Tenure before,

As the Kings *Thane* was a Tenant in *Capite*, so the *Thanus mediocris*, or middle *Thane* was only a Tenant by Knights service, that either held of a mean Lord and not immediately of the King, or at the least of the King as of an Honour, or Mannor, and not in *Capite*.

What was that *Trinoda Neceffitas*, which so often occurs in the Grants of the Saxon Kings, under this Form, *Exceptis istis tribus Expeditione, Arcis & pontis exstructi- one?* (See it in a Charter of King *Etheldred* in the preface to *Cokes 6: Report, &c.*) But that which was after Ex- pressed by *Salvo forinfeco servitio*: *Bracton: lib. 2 cap: 26. & 35: 12 Ed: 1 Gard 152: 26: Ass: 66. Selden Analest: Anglobrit: 78.*

And therefore it was said that Sir *Henry Spelman* was mistaken, who in his *Glossary verbo feudum*, refers the Original of *feuds* in England, to the *Norman Conquest*.

It is most manifest, that *Capite Tenures*, *Tenures by Knights Service*, *Tenures in socage*, *Frank-almoigne, &c.* were frequent in the times of the Saxons.

And if we will believe what is cited out of an old French Customary in a Mss: *treatise of the Antiquity of Tenures in England*, which is in many mens hands, all those

those Tenures were in use long before the Saxons, even in the times of the Britains, there it is said; The first British King divided Britain into four parts;

And gave one part to the Arch-flamines to pray for him, and his posterity;

A second part he gave to his Earls and Nobility to do him *Knights service*;

A third he divided among husbandmen, to hold of him in *socage*.

The fourth part he gave to Mechanicall persons, to hold in *Burgage*.

But that Testimony was wav'd, there being little certainty, or truth in the *British Story* before the times of *Cæsar*. Neither would they make use of that, which we are taught by *William Roille of Alençon* in his preface to the *Grand Customier of Normandy*, that all those Customs (among which these Tenures are) were first brought into Normandy out of England by *Edward the Confessor*.

Besides that which hath been said, we find Feuds both the name, and thing in the Laws of those times, among the Laws of *Edward the Confessor. cap. 35.* where, it is thus provided.

Debent enim universi Liberi homines, &c secundum feodum suum, & secundum tenementa sua, Arma habere, & illa semper prompta conservare, ad tuitionem Regni, & servitium dominorum suorum, &c. Lambard: Archaionom: 135.

This Law was after Confirmed by *William the Conquerour*, *vid: Cokes Instit. sect: 103.*

As these Tenures were Common in those times, so
were

were all the Fruits of them, *Homage, Fealty, Eſcuage, Reliefs, Wardſhips.*

For Reliefs, We have full Teſtimony in the Reliefs of their *Earls*, and *Thanes*, for which, ſee the *Laws of King Canutus*, cap. 68. & 69. the *Laws of Edward the Confeſſor*, cap: de *Heterochijs*, And what out of the book of *Domes-day Coke* hath in his *Inſtit: Sect: 103. Camden in Bark-ſhire, Selden in Eadmer, 154.*

That *Wardſhips* were then in uſe, and not brought in by the *Normans*, as *Camden in his Britt. 179.* Nor by *Hen: 3.* as *Randolph Higden* in his *Polichronicon*, And others (not underſtanding him) would perſwade, *vid: Seldens Notes on Fortescue: 51.*

Among the Priviledges Granted by *Edward the Confeſſor* to the *Cinque-Ports*, we meet with this, that their *Heirs* ſhall not be in *Ward*, *Lambards Perambulation of Kent: 101.*

And in the *Customs of Kent*, which are in the *Magna charta of Tottels Edition*, and in *Lambards perambulation*: There is a Rule for the *Wardſhip* of the *Heir* in *Gavel-kind*, and that he ſhall not be Married by the Lord. And thoſe *Customs* ſay of themſelves, that they were, *Devant le Conqueſt, et en le Conqueſt.*

For the Antiquity of *Wardſhips* in *England* and *Scotland*, ſee alſo *Heſt: Boet: lib: 11. Buchanan rerum Scot: lib: 6.* and the *Laws of Malcolme 2.* which prove the Antiquity of *Wardſhips* in *Scotland*, and therefore in *England*, before the *Norman Conqueſt*; for in thoſe times it is probable the *Laws* of both Nations

did not much differ, as for the times after, it appears they did not, by comparing their *Regiam Majestatem*, and our *Glanvil*. Neither is the bare Conjecture of Sir Henry Spelman sufficient, to take away the force of those Laws, *vid: Spelman: Glossar: verbo Feudum.*

Upon all this they did Conclude, *that upon consideration of the Authority given, and Grant thereupon made, the reservation of the Tenure cannot be said to be Aliud. S: a separate and distinct thing from the Authority of Granting the Land, but rather Included within it: And that the Reservation of the Tenure, though it be not ipsa concessio, the Grant it self, yet it is Modus concessionis, and a part of the Grant; and that therefore the Authority being not pursued in that, the whole Grant is voyd.*

5.

5. And so it was Resolved, for these reasons, and upon these Authorities.

1. *The Main and Principal reason, why they did Resolve that the Letters Patents were voyd in the whole, was, because that here the Commissioners had but an Authority, and that Authority they have not pursued.*

By the Commission they were to Grant the Lands, and to reserve a Tenure in Capite, or to leave the Reservation to the Law, now there is a Tenure by Common Knights service Reserved, so they have Executed their Authority in another manner, than the Commission Warrants, they have done *Idem alio modo*; And there-

therefore by the Rule of the Books before cited, the whole Grant is voyd.

It was agreed by all, that if the Commissioners here had Granted the Land, Reserving a Tenure in *Capite*, the Patent would have been good, and effectual, or if they had granted the Land, and Reserved no Tenure there because the Law in that Case would raise a Tenure in *Capite*, such a Grant would have been good, and well Warranted by the Commission:

2. This Commission is a *Nude Authority*, for the interest is in the King, and the Commissioners have only a bare Authority to grant, and therefore it ought to be pursued most strictly, both in *Matter*, and *Manner*, and the Execution of it is to be Expounded strictly.

This Answers all the Cases that have been put on the other side, where an Authority in some sort may be Executed *alio modo*, and yet good, as the Case of *Stanton and Barnes*, where by Custom the Lord might Grant *Copy-holds* in Fee, and he Grants a lesser Estate simply, or a lesser Estate with a Remainder over, and the other *Report*, that hath been cited between *Downs and Hopkins*, where the Custom was to Grant *Copies* for two lives, and he Grants to the Husband for Life, and after to the Wife *durante viduitate*; The Case of *Hatt and Arrow-smith*, where a *Copy holder* for Life was licensed to make a Lease for years, *si tam diu vixerit*, and he makes a Lease Absolutely, without that Limitation. The Case of *Baron & Feme* making a Lease upon the Statute of 32 H:8. The Case of 3 H:7. where upon a licence to Grant an Annuity, he grants it with clause of *distress*; and yet for that Case, see

the Case of *Suttons Hospital*. 10 Coke fol: 28. a.

The Case of *Priddle and Napper*, and all the other Cases, that have been put upon this Ground.

For in all those Cases there is an Interest Coupled with the Authority, and therefore they are not to be compared to this Case, in which there is only a meer and a bare *Authority*.

3. *This Commission is a publique Authority of Record*, to which the Subjects may Resort, and of which they ought to take Notice, to pals according the *Commission* at their Peril. And therefore if either through Ignorance, or Carelesness, or otherwise they neglect to have their Patents drawn pursuant to the *Commission*, the fault is their own, they cannot transferr the Blame of this to the King, as in like Case it is Resolved, upon the *Commission of Bankrupts* 2 Coke 26. So at the Common Law, a Patent without Recital of a Lease for years of *Record*, is voyd, for the Subject may resort to the Publique Record; The King intends *Ardua Regni*.

This answers the Objection, touching even that *Honour* of the King, that hath been spoken of, and clears his performance of his part in this Case.

For the King in favour of his Subjects of this *Realm*, hath Granted a good, and gracious, and effectual *Commission*, upon which many legal, and good, and effectual *Letters Patents* have been made, that have been allowed, and approved for good.

But if upon this *Commission*, so good, and gracious for the subject, the subject shall contrary to the Authority given by the *Commission* obtain *Letters Patents*,
in

in Fraud and Deceit of the Crown, to Defeat the King of his *Tenure* in *Capite*, a Principal Flower of his Crown, if these *Letters Patents* be voyd, where's the fault: certainly in the Subject, that contrary to the Authority of the *Commission*, obtains this Grant in Deceit of the King to Defeat him of his *Tenure*, which was but an ill return for so great and gracious a Bounty; and that *Objection* of the Operation of Law, answers not the intention of the party in this Case, for plainly, and apparently, the meaning of the Patentee was, to suppress the King's *Tenure* in *Capite*, and to hold by a mean, and Inferiour *Tenure*, which was contrary to the Authority of the *Commission*, and in deceit, and Prejudice of the King.

Now that *Patents* obtained in deceit, and Prejudice of the King, are clearly, and wholly, and utterly voyd, to all intents, and purposes, is a ground so Obvious, so Positive, and Infallibly true; that they would not cite any Book, or Authority to prove it, for it is marvellous clear, and Granted of all sides, that *Patents* obtained in deceit and Prejudice of the King; are altogether voyd.

If any desire an Authority, he may have a Cloud of Authorities in the Case of *Alton Woods*. Coke 1. Report.

4. This is an Authority appearing within the body of the Record, of the *Letters Patents* themselves; for the *Letters Patents* are *ex Assensu* of such and such Commissioners, *virtute & secundum intentionem Commissionis, &c.*

Now the *Tenure* in *Capite* being as strongly Implied in

in the *Commission*, as if it had been Expressed; (as it hath been confessed of the other part) for it is upon this *Implication*, that they say the *Patent* is voyd for the *Tenure*, it is as much, as if the King had given *Commission* to Grant the Land, to hold *in Capite*. and not otherwise.

Now in so much as the *Commissioners* have Granted the Lands, in *other Manner* (and all this appears within the body of the *Record* of the Letters Patents themselves) the *Patent* is voyd in the *whole*, for Construction is to be made upon the whole *Patent*, and not upon any part of it distinct, as it is Resolved in *Bucklers Case* 2 *Coke* 55.

And this hitherto hath been always the constant Resolution of all the *Judges of Ireland*, our Predecessors, that if upon Letters of *Warrant*, or *Commission*, *Letters Patents* be made varying in any point Material from the *Warrant* or *Commission*, (and all this appears within the body of the Letters Patents themselves) that the Letters Patents are all utterly voyd, and this hath been ever agreed upon by reason of the difference between the manner of passing of Letters Patents *in England*, and *Ireland*.

But where the *Warrant*, or *Commission*, and the variance do not appear within the *Letters Patents*, how it shall be ayded for the King, by *Averment*, or otherwise hath been some doubt, and *Question*.

5. *Although that it be true, that this Commission is of a vast, and large extent, yet it is not boundless, for the Law always bounds, and circumscribes these ample Authorities with reasonable, and equal constructions, without Prejudice*

to others, as it was Resolved upon the Commission of Sewers, upon which we have the Reported Cases in 5 Coke 99. *Rookes Case*, & 10 Coke 138.

This Commission of Sewers gives power, and Authority to the *Commissioners*, to proceed according to their wisdoms, and discretions, which is a most ample power yet the Law does bound, and Circumscribe it with an equal Construction. S. that their proceedings ought to be bounded with the rules of *Reason, Law, and Justice*, and that their Taxes be equal, and that all persons that be Subject to the danger, or receive benefit by the Reparation, be contributory to a ratable, and equal contribution of the charge, and if they do otherwise, their Ordinances are voyd, and they cannot make new inventions, as Artificial Mills for casting out of water, &c.

For these General Commissions are all accompanied in Law with an equal and reasonable construction for the Execution of them.

So this Commission is a most ample, and large Commission, for the securing of the Estates of the Subjects, in their Lands, but yet it ought to be so Executed according to Law, reason and Justice, that they do not Prejudice the King in his Tenures, contrary to their Warrant.

6. *Because that this Reservation of a mean Tenure, is in other manner than the Authority Warrants, and to the damage and Prejudice of the King.*

If the *Commission* were, to Grant an Estate for Life and they Grant an Estate *Tayle*, or if the Commission were to grant in *Tayle*, and they Grant in *Fee*, All the Patent

Patent is voyd, because they do it in *other manner* than the Authority Warrants, for the *Habendum is Modus Concessionis*.

If they Reserve another Rent, than is Warranted by the Commission, or Parcel an Entire Rent, where the Rent in charge ought to be Reserved, although that it be several upon the Survey, yet the whole Patent is voyd, because that they do it in *other manner* than the Authority Warrants, for the *Reddendum is Modus Concessionis*.

Why then shall it not be the same reason, in this Case for here they Reserve another *Tenure*, than that which is Warranted by the Commission, and therefore they have Executed their Authority in *other manner* than their Authority Warrants, for the *Tenendum* also is *Modus concessionis*.

It was Granted by them that Argued on the other side, that if it be Prejudicial to the King, the whole Patent shall be voyd.

Now it is most apparant, this Implied Tenure (if it be Admitted) will be greatly Prejudicial to the King, for the King shall loose his Tenure, and the fruit of his Tenure, in most Cases for ever, and in all Cases for a long time; and neither the *Master*, nor the *Attourney* of the Court of *Wards* can help it.

And for that, the course of Patens here in *Ireland* was Observed.

First, the *Commissioners* give Warrant for drawing of the Patent, and the Reservation of this mean Tenure, the Kings Council drew the Patent accordingly, and so

So it passes the signature of the *Lord Deputy*, the privy signet; and the Great Seal, then it is Enrolled in the *Chancery*, all this while it is taken according to the Tenure Expressed in the Patent, when it is Enrolled, it is transcribed into the *Exchequer*, and the Transcript delivered into the *Exchequer* by the *Master of the Rolls*, the *Lord Chief Baron* receives it, and delivers it to the second *Remembrancer*, and he puts it in charge according to the Tenure Expressed; the *Escheator*, and *Feodary* Inform themselves of the Kings Tenures there, where if they make enquiry, the Patent is produced, in which an Express Tenure is reserved, they cannot Judge the contrary, and so it passes according to the Express Tenure; and so have the *Letters Patents* now in Question passed, and the King by colour of them, hath lost the profits of the Land, and the benefit of the Tenure.

7. The Express reservation in the *Letters Patents* Excludes the Reservation, and Implication of Law, although (as in the Case in Question) it tend to make voyd the whole Grant, it is a sure rule in Law, *expressum facit cessare tacitum*. If the King upon his *Letters Patents* reserve no Tenure, it shall be a *Capite Tenure*, but if another Tenure be Expressed, that shall prevail; 33 *H. 6. 7. per prifot.*

In *Wheeler's Case* 6 *Coke* 6. Where in a Patent the words of the *Tenendum* were, *Tenendum de nobis per servitium unius Rosæ, pro omnibus servitijs*.

It was objected, that the Tenure as it is Expressed cannot stand, for that no Tenure can be without Fealty, and the words are *per servitium unius Rosæ, pro omnibus servitijs*

2. It was *Objected*, that in *Case* where no Tenure is *Reserved*, or in *Case* where it is *Expressed* to be *absque al quo inde Reddendo*, the Tenure shall be *Knights service in Capite*.

And therefore it was urged, that the Tenure in the Principal *Case*, must needs be a *Capite Tenure by Knights service*, and that the Tenure *Expressed*, should be voyd, and give place to the better Tenure for the King.

These are strong *Objections*, yet *Resolved*, in respect of that favour that is given to *Express Reservations*, that in the said *Case*, *Falty* (that is an incident to all services) shall be admitted to stand with the words, and then the Tenure *Expressly reserved* was so compleat that it might well Exclude the *Knights service* Tenure, which otherwise the Law would have *Implied*.

Hereby may appear the favour that is given to *Express Reservations*, and Tenures, that thereby a Tenure *in Capite by Knights service* shall be Excluded, a Tenure which shall arise where nothing is *Reserved*, which shall arise though the words be, *absque aliquo inde reddendo. vid: Sir. John Molins Case 6. Coke 5.*

It is agreed on the other side, that where the *Express Tenure* is good, there it *Controlls* the *Implied Tenure*, but in our *Case* it is voyd.

And where a Tenure *Expressed* is voyd, a Tenure by *Implication* of Law may arise.

But it was *Resolved*, that although the *Express Tenure* be voyd, yet no Tenure by *Implication* of Law, shall arise against the *Express Reservation*, And so in the *Case* of a
voyd

voyd *Habendum*, which stands upon the same reason, it was adjudged in *B: R: Between one Hegge and Crofts*, 33. et 34 *Eliz:* which you may see in *Bucklers Case*, 2 *Coke*: 55: Where the Case was.

Tenant for Life makes a Lease for years, and after grants the Reversion to *A: Habendum* from a day to come for Life, after the day the Lessee for years attorns, in that Case the *Habendum* is voyd, yet that voyd *Habendum* makes voyd the whole Grant and Excludes the Implication of Law in the Premises, and no Estate shall pass by Implication of Law in the Premises, against the Express Limitation of the party in the *Habendum*: see the Cases cited before p: 26.

So our *Tenendum* although it be voyd, yet the Express Reservation in the *Tenendum* shall Exclude the Implication of Law.

For that Opinion of *Martyn* in 4 *H: 6. 22.* that was Cited on the other part, that if Land be given in *Frankmarriage*, Reserving a Rent, the Reservation of the Rent is voyd, by reason of the Implied Tenure in *Frankmarriage*; that Opinion (as was said) may well be doubted of, for we find as good Authority against it, in the *old Tenures fol: 211.* That the Reservation of the Rent is good, and destroys the *Frank-marriage*, and makes it a Common Estate taylor: But the best Opinion is, that both of them shall stand together, S: the gift in *Frank-marriage*, and also the Reservation of the Rent, S: that the Donee in *Frank-marriage* shall hold quit of the Rent untill the fourth degree be past, and then the Rent shall take effect, and so was the Opinion of the Judges, in *Web and Potters Case* in 24 *Eliz:* and so are the

books to be understood; 13 *F.* 1. *formedon* 63. 31. *E.* 1. *taile* 31. 26 *E.* 3. *grants* 75 et 26 *Affs.* 66.

For the *Case of Littleton* 149. A man seised of certain Tenements, which he held of his Lord by *Knights service*, at this day grants by Licence the same Tenements to an *Abbot*, in *Frank-almoigne*, the *Abbot* shall hold immediately by *Knights service*, of the same Lord, of whom his Grantor held and shall not hold of his Grantor in *Frank-almoigne*.

In that Case (they say) the Express Tenure being voyd a Tenure by Implication of Law does arise.

It was Answered, there is a difference between the Kings Case, which is the Case in Question, and the Case of a Common person,

For the Grants of a Common person, the Rule of Law is, that the Grant shall be taken most strongly against the Grantor.

For the Kings Grants the Rule is, that they shall be taken most beneficially for the King, and most strong against the Patentees.

And we have another Rule, that the Grant of the King shall not be Extended to pass any thing, contrary to the intent of the King Expressed in his Grant, and if the Grant cannot take effect, according to his intent Expressed in his Grant, the Grant is voyd.

And therefore, for the Rules put by them that argued on the other side, that the Patents of the King shall be taken in such sence and to such intent that they shall be good, &c:

It may be Answered, that there is another Ground in our Law, that when the King is deceived in his Grant, so
that

that it cannot take effect, according to his intent Expressed in his Grant, the Grant is voyd, so the best Exposition is to make all these rules to agree together.

And therefore the rules put on the other side, are true with this Limitation S: *Except the King be deceived: so that his Grant cannot take such effect, as he intends by his Express Grant.*

In the Lord Lovels Case 18 H: 8. B: Pat: 104 The King *ex certa scientia, et mero motu* Grants Lands to one and to his Heirs Males; if a Common person had made such a Grant, the Law would say, that the word Males were voyd and the Fee simple should pass; But will the Law make such a Construction in the Kings Grants? No, there the Grant shall be voyd, for he was deceived in his Grant, in that it cannot take effect according to his intent Expressed in his Letters Patents.

And so in Case of 7 H: 4. 42. & 21. E: 3. 47. The Earl of Kents Case, if the King hath a Ward of Land, or a Lease of Land for years, and by his Letters Patents Grants the Land to another and his Heirs, the Grant is voyd, and it shall not amount by Construction, to a Grant of his Estate, or Interest vid: 21. Ass: 15. And the other books Cited in the Case of Alton Woods upon this Ground.

29 Eliz: in the Exchequer, the Case was; King H: 7. was seised of two mannors S: *de Ryton et Condor*, he Grants *ex certa scientia et mero motu totum illum manerium de Ryton et Condor*, adjudged that the Grant was voyd.

The like Case was Resolved 39 Eliz: where the Queen was seised of the Mannors of Millborn and Saperton in the County of Lincolne, and the Queen Grants

Grants *ex certa scientia*, & *mero motu*, totum illud manerium de Milborn, cum Saperton in Com: Linc: and it was held that neither of the Mannors did pass; And yet if a Common person had made such Grants; the Grantee in both the said Cases should have had both Mannors.

So in our Case, the King is decived in his Grant, in that his Grant cannot take effect, according to his intention therein Expressed, for the Kings intention is to make a Grant agreeable in all things, to the Authority given to the Commissioners by the said Commission;

And that appears plain'y by the very words of the *Leters Patents*, for the words are, *Sciatis quod nos &c. virtute ac secundum intentionem et effectum of the said Commission, Dedimus et Concessimus &c.* as in the Patent; and he conceived that the Warrant made by the Commissioners, for passing the Patent (which here we call the *fiat*) had been according to the intent, and effect of the said Commission: and upon that Warrant which Exceeded the Authority given to the Commissioners, this Patent was past, yet still with a reference to the intention and effect of the Commission.

Now this Grant cannot by any possibility take effect according to the Kings intention therein Expressed, for the Kings intention in the beginning of the Grant is, that it shall be according to the intention, and effect of the Commission, which must be a Tenure by *Knights service in Capite*, either by Expresse Reservation, or by Implication, and Operation of Law
And

And the Tenure Reserved in the Patent, is a Tenure by *Common Knights service*, as of the *Castle of Dublin*, differing altogether from the intention, and effect of the Commission so as it is not possible, that this Tenure Expressly Reserved can be according to the intention and effect of the Commission, or that the intent and effect of the Commission can any ways accord with the Tenure Expressly Reserved in the Patent.

So as it is very plain and manifest that the King is deceived in this Grant, and that it cannot take effect according to his intention therein Expressed.

For the Authorities on which their Resolution was grounded.

The Principal Case was that of 12 *Afs.* 24. which (as it was said) was a *Judgment* in effect in the point, a *Judgment* in a time, when, the *Law* was as flourishing, and the *Judges* as Learned, as in any time either before, or since, a Judgment approved in all ages subsequent, 26 *Afs.* 39. 11. *H.* 4. 3. &c. And no *Authority* in all our *Books* against it, for the *Material Cases* that have been put on the other side are of *Authorities* accoupled with an Interest, and by Consequence do not come to the point in Question.

And we see that the *Authority* of this *Judgment* is so great, and clear, that it is confessed by them that argued on the other part; But the reason of the Judgment given by the *Judge*, that gives the *Judgment* is denied *S: pur ceo que il fait ceo en autre manner*, and a new reason is Invented, *S: because he does not pursue his Authority.*

Here we find them put to a straight; *S: to Contests*

fels the Judgment, and deny the reason, for who better knew the reason of the *Judgment*, then the *Judge* that gave, it, this new reason *S. That he hath not pursued his Authority* if it be Examined, will come to the first reason, for if it be demanded, why he hath not pursued his Authority it must be *Answered, pur ceo que il ad fait ce en autre man-
ner que le Authority soy. garrant*, which is the reason of
12 *Ass.*

But we have other *Authorities* in the point, upon the same reason, that of 10 *H. 7. 15* which hath been remem-
bered, *per Keble* the most *Learned Lawyer* of that time, *quant home ad Authority de faire ascun fait a un autre, il doit
pursuer son Authority, en matter, et en forme*, there is *Modus
concessionis*, and by the Case that he there puts, if he does it
in other form, *alio modo* it is voyd.

If I *Enfeoff* a man, to *Enfeoff* another, and he levyes a *Fine*
this is voyd, yet the matter in *substance* is the same, for a
Fine is but a *Feoffment of Record*, but because that he hath
done it in other manner, all is voyd.

11 *H. 7. 13.* A Letter of *Attorney* to make *Livery* to I
S. or I. N. and the *Attorney* makes *Livery* to both, the *Li-
very* is voyd in all, and it is not good as to the one, and
voyd as to the other, but voyd in the who'e, because that
he hath done it in other manner, then the *Authority Warrants*.

8 *Coke* 85 In *Sir Rickard Pexhalls Case*; if the King
Licenses his *Tenant*, to alien two parts of his *Manner*
of *Dale*, which is held in *Capite*, and he aliens all the
Manner, it is voyd in the whole, and it is not good
for

for two parts, and voyd for the third, And the Reason is, because he doth it in other manner than the License War-rants vid. 10 H. 7 13. 38 H. 8. Dyer 62. 40. Aff. 38. 10. H. 7. 15.

There was a Report cited by the Chief Justice of the Common-Pleas, and the Chief Baron, the Case was in C. B. in England T. M. 2 Caroli. between George Bishop of Chichester Plaintiff, and John Freeman Defendant. Intr. Pasch 1. Caroli. Rot. 207. And the Case was this,

The Bishop of Chichester was seised in Fee, (in the right of his Bishoprick,) of Allingburn Park, in the County of Suffex, and he and his Predecessors have anciently granted the Office of Keeper of this Park for life, with the Fee of five Markes.

Anthony Bishop of Chichester, 2 February 44 Eliz. by his Deed granted the Office of Keeper of the Park to one Freeman for life, *Et ulterius concessit pro executione officij prædicti* the ancient Fee of five Marks, *una cum* a livery Coat, or thirteen shillings four pence for it, *Nec non pasturam pro duobus equis, una cum* the windfalls, which Grant was confirmed by the Dean, and Chapter.

And whither this Grant was good against the successor, or voyd, upon the Statute of anno 1 Eliz. cap: 25 was the question.

In which the doubt was whither this addition of a livery Coat, Pasturage, and windfalls will make the whole Grant utterly voyd, or if the Law shall make such a construction, that for this addition it shall be onely voyd, and shall stand good for the other; which was the ancient Fee, and well granted.

H

And

And by Justice Crooke, and Harvy against Telverton, the Grant is voyd in the whole, because, that the Bishop hath not pursued the Authority given him by the Statute, by reason of this Express, and new addition, and yet they profess, that they had rather have given Opinion for the Defendant, for that he was a poor man, and an Ancient servant to the Bishop; and yet in this Case, the Addition and new Augmentation is a several, and distinct clause in the Grant, and the things added *de novo*, are also several, and distinct in specie from the Ancient Fee of five Marks.

And in the Argument of this Case, Justice Crooke cited a far stronger Case to be Adjudged in the Case of the Archbishop of Canterbury 43 Eliz: and the Case was this,

Parker Archbishop of Canterbury Granted the Office of Surveyorship, with the Ancient Fee to one Parker, & ulterrius he Granted unto him *pasturam pro duabus equis* in the Park, and the whole Grant was Adjudged voyd, and yet here was a several Grant, by a several, and distinct clause, and of another thing several, and distinct in specie, Aliud, & Aliud.

And these Cases are far stronger then the Case in Question, for here there is not a bare Authority, but an Interest accoupled with an Authority.

And in this Case Justice Crooke cited Scamblers Case, 41 Eliz: to be Adjudged, that the whole Grant was voyd, and not good as to the man of full age, and voyd as to the Infant, as it hath been cited by some that argued on the other side.

And

And so upon the whole Matter they did resolve.

1. *That the Commissioners by this Commission have a¹ good, and Legall, and sufficient power, and Authority to Grant.*

2. *That all Letters Patents made upon this Commission,² in which they have pursued their Authority, are good and effectual in Law S: where they have either reserved an Express Tenure by Knights service in Capite, or no Tenure, for there the Law Implies a Tenure in Capite.*

3. *But where the Commissioners reserve a mean Tenure,³ the whole Patent is voyd.*

1. *Because, that the Commissioners have but an Authority.*

2. *Because, that this is but a Nude Authority, and not accoupled with any Interest.*

3. *Because. it is a Publique Authority of Record, whereof the Subjects ought to take notice, to pass according at their peril, otherwise the Patent shall be in deceit of the King.*

4. *Because, that the Authority appears within the Letters Patents themselves, and Exposition shall be made upon the whole Patent.*

5. *Although it be a most ample and Large Commission, yet it is Bounded and Circumscribed by the Law, with an equal Construction S. that*

nothing shall be done in other manner than the Authority Warrants in Prejudice of the King.

6. Because that this Reservation of a mean Tenure, is in other manner than the Authority Warrants, and is in Damage and Prejudice of the King.

7. And lastly because that this Express Reservation Controls the Implication of Law: and for that the King was deceived in his Grant, in that it cannot take effect according to his Intention therein Expressed.

For these Reasons they did resolve.

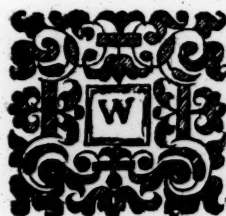
That this Express Reservation of a mean Tenure tends to the destruction of the whole Patent, and makes it voyd in Law both to the Lands and to the Tenure.

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The Order of the Council Board upon this Resolution of the Judges

By the Lord Deputy and Council

WENTWORTH



Hereas there was an Act of Council made at this Board, and Dated at the Abby of Boyle the Eleventh day of July 1635. Ordaining, and Establisbing, that the Lords, Knights, Gentlemen, and Inhabitants, their Heirs, and Assigns holding any Castles, Mannors, Lands, Tenements, or other hereditaments in the County of Roicomon, by or under any effectnal Letters Patents from his Majesty, or any of his Royal Predecessors Kings, or Queens of England, should have, hold, Possess, and enjoy all the said Castles, Mannors, Lands, Tenements, and Hereditaments of what kind, or nature soever they be, to them, and to every of them, and to those, who hold any Estates under them, against his Majesty, his Heirs, and Successors, in as full, large, ample, free and beneficial manner to all intents, purposes, and Constructions, as if the truth of their several Cases, and their several Letters Patents passed thereupon, had been specially found in the Great Office then to be taken, for finding his Majesties Title to the said County, and their Letters Patents, accordingly entred, in hæc verba, in the said Office so that they did Produce their several Letters Patents or the Enrollments thereof, before us the Lord Deputy, and Council

cil, at this Board, before the first day of the then next Easter Term, and that no possession should be taken from any such Patentees, or their Assigns or Tenants, whose Patents should be at this Board allowed to be good, and effectual in Law: And whereas the like Acts of Council were made at this Board, for the several Counties of Sligo, Mayo, and Gallway, and the County of the Town of Gallway; And whereas several Letters Patents past under his Majesties Great Seal, of divers Lands, Tenements, and Hereditaments in the said several Counties, by colour of a Commission under the Great Seal, Dated the Second day of March, in the fourth year of the Reign of his Majesties Royal Father King James, of Blessed memory, were Presented unto us at this Board, which being taken into consideration by us, We thought fit for our better Information of the Validity of the said Letters Patents, to call before us some of those who claymed by those Letters Patents as namely, our very good Lord the Viscount Dillon of Costilllogallen, whom we appointed to attend us with his Learned Council therein, which he did accordingly; Whereupon his Majesties Learned Council, and the Council Learned of the said Lord Dillon agreed upon a Case drawn up by them to be argued by them, on both sides before us, which Case followeth in hæc verba, King James by Commission under the Great Seal, Dated the second day of March, in the fourth year of his Reign, did Authorize certain Commissioners, to Grant the manner of Dale, by Letters Patents under the Great Seal of this Kingdom, to A: And his Heirs, and there is no direction given in the said Commission, touching the Tenure to be reserved; There are Letters Patents by colour of the said Commission passed unto A: and his Heirs, to hold by Knights service, that is to say by the Twentieth part of £c. as of his Majesties Castle of Dublin, the Question is, whether the said Letters Patents be voyd in the whole, or only

only to the Tenure, upon which Case his Majesties Learned Council and the learned Council on the part of the said Viscount Dillon argued before us several days, and We (desirous to take such a Resolution in the matter as might be equal and just) held fit to advise therein withall his Majesties Judges, who not agreeing unanimously in Opinion, We Adjudget it fit, that every of them should argue it, and deliver his Judgment, and Opinion therein, before us, which they did accordingly. Wherein five of them viz: the Lord Chief Justice of h. s. Majesties Court of Kigns Bench, the Lord Chief Justice of his Majesties Court of Common Pleas, the Lord Chief Baron of his Majesties Court of Exchequer, Baron Barry, and Justice Rives Concurred in Opinion clearly, that the Letters Patents were voyd in the whole, and two only, viz: Justice Mayart and Justice Cressly differed from those five in Opinion; holding that the Letters Patents were only voyd, as to the Tenure; We thereupon taking the same into consideration at this Board, do hereby Adjudge, Order, and Declare, that the said Letters Patents are wholly voyd in Law; and consequently that all such Letters Patents passed under colour of the said Commission, and that mention the parcels Granted to be held by Knights service, as of his Majesties Castle of Dublin, or by any Tenure other then by Knights service in Capite Generally, are not good, effectual, or valid in Law, but voyd in the whole; and therefore we do at this Board disallow all such Letters Patents so Granted as aforesaid, of any Lands, Tenements, or Hereditaments in any of the said Counties of Roscomon, Slygo, Mayo, Gallway, or the County of the Town of Gallway. Given at his Majesties Castle of Dublin 13 July 1637.

R: Dillon. Ad: Loftus. W: Parsons. Gerr: Lowther R: Bolton. Chr: Wandesford Ph: Mainwaring, Cha: Coote. Geo: Radcliff.

T H E E N D.